Filed 9/14/09 P. v. McIntosh CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. GARY LEMONT McINTOSH, Defendant and Appellant.	C059646 (Super. Ct. No. 07F00597)

A jury found defendant Gary Lemont McIntosh guilty of first degree residential burglary and attempted first degree residential burglary. Additionally, the jury found he had four prior felony convictions. The trial court sentenced him to state prison for an aggregate term of 50 years to life plus 31 years.

On appeal defendant contends: (1) the trial court abused its discretion when it failed to grant a mistrial or strike the jury panel when a prospective juror saw him in shackles[1] outside of the courtroom; (2) the trial court failed to exercise

---

[1] Despite defendant's description, the record indicates defendant was in handcuffs, not shackles.

"informed" discretion when it imposed the three strikes sentence on the burglary charge; and (3) the aggregate sentence constitutes cruel and unusual punishment. Disagreeing with these contentions, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On January 19, 2007, defendant was spotted with a knife at the back window of the Montoya residence. Gerald Montoya called 911. A patrol officer received a call at approximately 9:58 a.m. asking him to respond to the attempted burglary. On his way to the house, the officer spotted defendant five or six blocks from the home. A search of defendant uncovered a knife, jewelry, an iPod, a laptop computer, and some money. The items found on defendant were stolen from a nearby house on January 17, 2007. Defendant was charged with one count of attempted burglary and one count of burglary, both in the first degree.

During jury selection, defendant claimed some of the prospective jurors saw him in the hallway while he was escorted in handcuffs to the courtroom. Defendant's counsel moved to strike the jury panel. The trial court denied the motion to strike the panel but later questioned the panel at the behest of defendant's counsel and determined that none of the prospective jurors had seen defendant.

On the following Monday, however, the court determined a prospective juror had seen defendant while going down the stairs in the courthouse. Defendant's counsel moved for a mistrial;

the court denied the motion. Subsequently, defendant's counsel used a peremptory challenge to excuse the prospective juror.

Defendant was convicted of both charges. Thereafter, the jury found he had been convicted of first degree burglary in 1985, 1986, and 1991 and of being a felon in possession of a firearm in 2000. The court determined that the first three priors were strikes under the three strikes law.

Defendant moved to strike his prior convictions under *Romero*.[2] In ruling on that motion, the court stated that it could not "find a legal justifiable reason to strike any of those strikes . . . ." Due to defendant's recidivism, the court decided to sentence defendant in accordance with the recommendation of the probation report and chose not to use its discretion to strike any of the strikes.

On the attempted burglary charge, the court sentenced defendant to an indeterminate sentence of 25 years to life plus an additional 15 years for the three prior conviction enhancements. On the burglary charge, the court also sentenced defendant to an indeterminate sentence of 25 years to life plus an additional 15 years for the three priors. Defendant also received an additional year for a prior prison term enhancement. Thus, the aggregate sentence was an indeterminate sentence of 50 years to life plus a determinate sentence of 31 years.

---

[2] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

DISCUSSION

I

The Court Did Not Abuse Its Discretion When It Denied Defendant's Motions For Mistrial And For Jury Dismissal Because The Jury Did Not See The Handcuffed Defendant In The Hallway And Thus Was Not Prejudiced Toward Defendant

Defendant contends the trial court must dismiss the jury panel or grant a motion for mistrial if a juror views a defendant in handcuffs while escorted to or from the courtroom because, he argues, the juror would be so prejudiced toward the defendant that the juror would be unable to be impartial. He claims we must reverse his convictions because the trial court did not dismiss the jury or grant a mistrial. We disagree.

"A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial." (*People v. Silva* (2001) 25 Cal.4th 345, 372.) When denying the claim that the trial court should have granted a mistrial because some of the jurors saw the defendants in handcuffs in the hall, the court in *United States v. Leach* (8th Cir. 1970) 429 F.2d 956, 962, noted that the practice of handcuffing "prisoners when they are being taken from one place to another . . ." is highly desirable and necessary and "the jury is aware of this." Furthermore, drawing from *People v. Du Bose* (1970) 10 Cal.App.3d 544, 549-550; *People v. Jacobs* (1989) 210 Cal.App.3d 1135, 1141; and *United States v. Halliburton* (9th Cir. 1989) 870 F.2d 557,

560-561, *certiorari denied*, 492 U.S. 910 (1989), 4 Erwin et al., California Criminal Defense Practice (2009) Trial, chapter 80, section 80.09[6][d] notes that "A defendant may be restrained while in transit between a jail and the courtroom. If jurors happen to observe a handcuffed defendant in the hallway during transportation to and from the courtroom, prejudice is not likely to arise, and the trial court is not required to later instruct the jury that the physical restraints have no bearing on the defendant's innocence or guilt." (Fns. omitted.)

The only juror who saw defendant in handcuffs in transit to the courtroom was excused from the panel by defendant's peremptory challenge. The court determined that none of the remaining prospective jurors saw defendant in handcuffs in the hallway and defendant does not point to any contrary evidence. Thus, defendant's mistrial argument fails. For the same reason, the court did not abuse its discretion when it denied defendant's motion to strike the jury panel.

II

Defendant Was Not Deprived Of Effective Assistance Of Counsel

Defendant argues his counsel should have done more to protest the possibility that the jury might have seen him in handcuffs. He argues that a reasonably competent attorney "would have realized the potential for prejudice that was present when a potential juror saw [defendant] in shackles"; and thus, in addition to the motions for dismissal of the entire jury panel and for mistrial, his counsel should have had "the jury admonished to disregard the fact they had seen [defendant]

in" handcuffs; the failure to admonish the jury constitutes ineffective assistance of counsel and thus requires us to reverse defendant's convictions.

This argument lacks merit because the trial court *did* admonish the jury to disregard the fact that defendant was in handcuffs -- *twice*. The first time, at the request of defendant's counsel, the court told the jury, "Mr. McIntosh is in custody, and the fact that he is in custody should not in any way affect your decision-making process in this case. It's not evidence, just as the arrest, just as the -- being brought to trial, just as the charges are not evidence that you should consider. Again, evidence is only something that comes from the witness stand, not from any other source." Later, again at the behest of defendant's counsel, the court admonished the jury "that Mr. McIntosh is in custody, that the reasons being are many that a person is in custody, and that in no way should influence your decision in this case one way or the other." Thus, defendant received effective assistance of counsel.

III

The Court Exercised Informed Discretion When Imposing Defendant's Three Strikes Sentence

Defendant argues the trial court's failure to strike some of defendant's prior convictions when imposing defendant's three strikes sentence constituted an abuse of discretion. We disagree.

In three strikes cases, where a proper basis exists, the trial court can exercise its discretion under Penal Code[3] section 1385, subdivision (a), to dismiss a prior conviction allegation with respect to one count and not the other. (*People v. Garcia* (1999) 20 Cal.4th 490, 503-504.) "The judge . . . may, either of his or her own motion . . . in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. . . ." (§ 1385, subd. (a).) The court in *Garcia* upheld the trial court's decision to strike the prior conviction allegations as to one count because the defendant's criminal activity "all arose from a single period of aberrant behavior." (*Garcia*, at pp. 503-504.)

Here, defendant argues the court should have struck two prior convictions with respect to one count. However, unlike the defendant in *Garcia*, where the defendant's criminal activity arose from "a single period of aberrant behavior," defendant here has 24 years of criminal activity.

Defendant began his criminal career in 1983 shortly after his 19th birthday and continued to be criminally active up until his arrest for this crime -- nearly 24 years later. On March 7, 1983, defendant was convicted of burglary in the second degree and was placed on three years' probation. Ten days after receiving his sentence, he stole a car and was convicted of auto

---

[3] All further section references are to the Penal Code.

theft in the second degree on March 24, 1983. In 1984, defendant was convicted of auto theft in the second degree and was placed on three years' probation and sentenced to 16 months in state prison for violating probation. In 1985, he was convicted of first degree burglary and was sentenced to two years in state prison. In 1986, he was convicted of first degree burglary and was sentenced to seven years in state prison and was released on May 18, 1991. Twenty-four days later on June 11, 1991, defendant was arrested for first degree burglary and was convicted and sentenced to 15 years in state prison. Defendant was paroled on June 10, 1999, and on July 13 he was arrested and charged with being a felon in possession of a firearm, possession of drug paraphernalia, and altering the ID on a firearm; he was sentenced to eight years in prison. He was paroled in December 2005 and in June 2006, he was arrested for being in possession of drug paraphernalia and was sentenced to 17 days in county jail. Subsequently, parole was revoked and he remained in jail for six months and was released on December 26, 2006. On January 19, 2007, defendant committed the burglaries at issue. On these facts, the trial court found there was no proper basis on which it could rely to strike any of the strikes.

Defendant offers some possible factors the court could have used as justification for striking the strikes. However, a possible drug dependency, an undocumented allegation of possible mental health issues, and the alleged nonviolent nature of the

current crimes do not outweigh 24 years of criminal activity such that two strikes had to be dismissed.

We exercise a deferential standard of review of the trial court's decision. (*People v. Garcia*, *supra*, 20 Cal.4th at p. 503.) The trial court's refusal to strike any of the strikes was not an abuse of discretion.

IV

The Determinate Sentence Of 31 Consecutive Years And An Indeterminate Sentence Of 50 Years To Life Were Not Cruel And Unusual Punishment

Defendant argues that the imposition of a determinate sentence of 31 years consecutively to an indeterminate sentence of 50 years to life is a sentence that is disproportionate to the crime and thus amounts to cruel and/or unusual punishment. We disagree. Although the proportionality principle "does not require strict proportionality between crime and sentence," it does prohibit "extreme sentences that are 'grossly disproportionate' to the crime." (*Ewing v. California* (2003) 538 U.S. 11, 23 [155 L.Ed.2d 108, 119], quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 [115 L.Ed.2d 836, 869].) Defendant's sentence, in accordance with precedent, constitutes a valid sentence under the Eighth Amendment to the United States Constitution and thus, does not amount to cruel and/or unusual punishment.

To determine whether the current punishment may be considered cruel or unusual punishment, it is necessary to describe what is not. Sentencing an offender to a life sentence

was not cruel and unusual punishment for fraudulent use of a credit card, passing a forged check, and "'felony theft,'" all crimes totaling approximately $300. (*Rummel v. Estelle* (1980) 445 U.S. 263, 264-266 [63 L.Ed.2d 382, 385-386].) Under the California Constitution, the imposition of a 61-year-to-life term for an offender convicted of two counts of residential burglary with two prior convictions for the same offense was not cruel or unusual punishment. (*People v. Ingram* (1995) 40 Cal.App.4th 1397-1398, 1415-1416, disapproved on another ground in *People v. Dotson* (1997) 16 Cal.4th 547, 559, 560, fn. 8.) A sentence of 25 years to life for a felon in possession of a handgun who had two prior robbery convictions was not cruel or unusual punishment. (*People v. Cooper* (1996) 43 Cal.App.4th 815, 828.) Under California's three strikes law, it was not cruel and unusual punishment to sentence a recidivist criminal to 25 years to life for stealing three golf clubs. (*Ewing v. California*, *supra*, 538 U.S. at pp. 11, 30-31 [155 L.Ed.2d at pp. 108, 123].) Decided on the same day, the court in *Lockyer v. Andrade* (2003) 538 U.S. 63, 66-68 [155 L.Ed.2d 144, 151-153] held that under California's three strikes law, two consecutive terms of 25 years to life were not cruel and unusual punishment for two counts of petty theft. In response to Justice Souter's dissent that this sentence was equivalent to a life term without

the possibility of parole, the court noted the "argument . . . misses the point. Based on our precedents, the state court decision was not contrary to, or an unreasonable application of, our clearly established law." (*Lockyer*, at p. 74, fn. 1 [155 L.Ed.2d at p. 157, fn. 1].)

Defendant argues that his sentence of two consecutive terms of 25 years to life and a determinate sentence of 31 years for a 44-year-old man would amount to a life sentence and this constitutes cruel and unusual punishment. If this argument were to succeed, one could foresee a 78 year old convicted of murder and sentenced to 10 years with the possibility of parole would be a life sentence and constitute cruel and unusual punishment; whereas, if the same crime were committed by a 40 year old it would fall within the parameters of the Eight Amendment. A life sentence without the possibility of parole is not equivalent to a shorter sentence simply because the offender, who receives the shorter sentence, is so old that he will assuredly die in prison. "Two different sentences do not become materially indistinguishable based solely upon the age of the persons sentenced." (*Lockyer v. Andrade*, *supra*, 538 U.S. at p. 74, fn. 1 [155 L.Ed.2d at p. 157, fn. 1].) The length of defendant's sentence does not necessarily constitute cruel and unusual punishment.

The Supreme Court acknowledges that proportionality principles guide the application of the Eighth Amendment to noncapital offenses, but the bar remains high. (*Ewing v.*

California, *supra*, 538 U.S. at pp. 23-24, 30-31 [155 L.Ed.2d at pp. 119, 123].) "Recidivism is a serious public safety concern in California and throughout the Nation." (*Id.*, at p. 26 [155 L.Ed.2d at p. 120].) In accordance with *Ewing*, the proportionality of defendant's sentence must be examined in the context of the intention of California's Legislature. (*Id.*, at p. 29 [155 L.Ed.2d at p. 123].)

Defendant's sentence is long but it "reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated." (*Ewing v. California*, *supra*, 538 U.S. at p. 30 [155 L.Ed.2d at p. 123].) Defendant, like the defendant in *Ewing*, has had a long history of felony recidivism. He has not shown his case to be so extraordinary that it constitutes a constitutional violation. He is a career criminal who has been sentenced in accordance with the intention of the three strikes law, which punishes not only for the trigger offense but also for his status of having committed "'repeated criminal acts that have shown that [the offender is] simply incapable of conforming to the norms of society as established by its criminal law.'" (*Id.*, at p. 29 [155 L.Ed.2d at p. 122], quoting *Rummel v. Estelle*, *supra*, 445 U.S. at p. 276 [63 L.Ed.2d at p. 392].) It follows from precedent, the proportionality principle, and the Legislature's intent, that defendant's punishment is within the bounds of the Eighth Amendment; therefore, his sentence does not constitute cruel and unusual punishment.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

SCOTLAND, P. J.

BUTZ, J.